SUBJECT INDEX

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FEDERAL STATUTES

RULES OF CIVIL PROCEDURE, COLO.

PETITION FOR A WRIT OF CERTIORARI

United States Supreme Court

No.....

JOSEPH W. BOTTONE, *Petitioner,*

vs.

HENRY S. LINDSLEY, BENJAMIN C. HILLIARD, JR., MORTON M. DAVID, IRA L. QUIAT, AND FREDERICK E. DICKERSON, *Respondents.*

Comes now Joseph W. Bottone, pro-se, pursuant to Sec. 272 of the Judicial Code; Title 28, Sec. 394 U.S.C.A., and respectfully petitions this Honorable Court for a writ of Certiorari to the United States Circuit Court of Appeals for the tenth Circuit, to review a decision entered on November 5, 1948, (rehearing denied on December 13, 1948) affirming a judgment of the United States District Court, for the District of Colorado, entered on January 9, 1948, granting defendants motion to dismiss the complaint.

Jurisdiction of this Court is based on Sec. 240 (A) of the Judicial Code as amended by the Act of February 13, 1925, "In any case, Civil or criminal, in a Circuit Court of Appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

STATEMENT OF THE CASE

The parties will be referred to as the Appellant and Appellees as they appeared in the Court below.

The Circuit Court of Appeals will be referred to as the Court below.

The United States District Court will be referred to as the Trial Court.

The District Court of The City and County of Denver State of Colorado will be referred to as the State Court.

This action pertains to a proceeding in the State Court, and relates to the distribution of a decedent's estate.

The complaint avers that all of the Appellees are officers of the Court, that they offended the Fourteenth amendment to the Constitution of the United States, by depriving the Appellant of his property without due process of law, and denied the Appellant the equal protection of the laws of Colorado. (R.1-2)

The complaint avers that the decedent's estate was being probated in the County Court, State of Colorado, and that the Appellant had a vested share and interest in the said estate (R.2)

A civil action was filed in the State Court to enforce a written trust, (R.2) and impress a trust upon the estate.

An answer and cross claim was filed in the said case. (R.2)

A jury was demanded and the the fee paid within the time required by law. (R.3)

The Appellant did have a legal right to a jury trial of the issues of fact; the Court denied a jury trial, discriminated

against the Appellant, and ordered the jury fee returned. (R.3)

A money judgment and a decree was entered against the Appellant without regard for the law in such cases. (R.3)

The Administrator with the will annexed was acting illegally and fraudulently. (R.4)

The cross claim did not state a claim upon which any relief could be granted, nor was it filed within the time required by law. (R.4)

There was no Findings of fact and conclusions of law entered by the State Court although the Rules command that duty.

The State Court did not have any jurisdiction of the subject matter, the legal representative, or to enter the judgment and decree in such cases; That original jurisdiction in such cases is conferred on the County Court by the Colorado Constitution. (R.4)

That all of the Appellees conspired with each other to defraud the Appellant of his interest and share in the said estate, to have the Court enter a judgment for $2200.00 against him, and to deprive him of his right to a jury trial; That their scheme was accomplished to the Appellant's injury. (R.4)

The Appellant was deprived and defrauded of his rights and property without due process of law. (R.4)

The Appellees filed a motion to dismiss the complaint in the trial Court for failure to state sufficient facts upon which relief could be granted, (R.19) the said motion was granted by the trial Court, (R.20) on January 9, 1948.

The Appellant elected to stand upon his complaint, (R.20) the Court below affirmed the judgment of the trial Court on November 5, 1948, and the Appellant now seeks a reversal in this Court.

QUESTION INVOLVED AND PRESENTED

Since the motion to dismiss the complaint, admits that all of the allegations in the complaint are true and well pleaded the only question here is, whether or not the Court erred in granting the said motion, without a hearing in due course, upon the questions raised by the complaint.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The said Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals, and with the decisions of this Court, same matters.

2. The said Circuit Court of Appeals has construed a Federal Statute in conflict with the decisions of this Court on the same Federal Statute.

Respectfully submitted,

JOSEPH W. BOTTONE,
Petitioner,
303 North First Street,
Albuquerque, New Mexico.

SUPPORTING BRIEF

United States Supreme Court

No.....

JOSEPH W. BOTTONE, *Appellant,*

vs.

HENRY S. LINDSLEY, BENJAMIN C. HILLIARD, JR., MORTON M. DAVID, IRA L. QUIAT, AND FREDERICK E. DICKERSON, *Appellees.*

ALL EMPHASIS APPEARING HEREIN ARE MINE

THE COURT ERRED IN GRANTING THE MOTION TO DISMISS

This is a tort action brought by the Appellant against the Appellees to recover damages for depriving the Appellant of his property without due process of law. The action was brought pursuant to a Federal Statute that reads as follows, U.S.C.A. Title 8, Sec. 43; R. S. Sec. 1979, Civil action for deprivation of rights; Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory, subjects or causes to be subjected, any Citizen of the United States, or other person within the jurisdiction thereof, to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The complaint alleges (R.1-2) that all of the Appellees are officers of the Court in the State of Colorado; that they offended the fourteenth amendment to the Constitution of the United States, by depriving this plaintiff of his property without due process of law, and denied to this plaintiff the equal protection of the laws of Colorado.

In Carrol v. Morrison, 149 Fed. (2d) 404, Syllabus 1. reads, Under Federal Rules, on motion to dismiss on grounds complaint does not state a claim, *Complaint must be viewed in light most favorable to plaintiff, and truth of facts well pleaded*, including facts alleged on information and belief are admitted, F.R.C.P. Rules 8F, 11, 12B. Syllabus 3. reads, A complaint should not be dismissed unless it appears certain plaintiff is not entitled to relief under any state of facts which could be proved regardless how likely it may seem plaintiff will be unable to prove his case, 8F, 12B, (6).

Page 406, No matter how likely it may seem that the pleader will be unable to prove his case, *he is entitled upon averring a claim, to an opportunity to try to prove it.*

Now, at the oral hearing in the trial Court the Hon. Judge Symes said, (R.37-38)

The Court: Mr. Bottone, you claim you were entitled to a jury trial?

Mr. Bottone: That's right, under Rule 38-A.

The Court: *That is clearly a Federal question; it is a right granted you by the Federal Constitution*, and if the Supreme Court of the State held adversely to that contention, then you had a right to go to the Supreme Court on that question alone, *because they held against you on a Constitutional question*, and that is good for an appeal to the Supreme Court of the United States, as I recall the law.

I am in accord with the reasoning as expressed by the Court, and that is the very purpose of bringing this action pursuant to the Federal Statute enacted by Congress for the protection of Civil rights.

I quote the pertinent parts of an opinion in a similar case, where the action was brought under the Civil Rights Act.

Case of Picking v. Penn. R. Co., 151 Fed.(2d) 240; Syllabus 2. Where plaintiff pleads pro-se in a suit for protection of Civil Rights, the Court should endeavor to construe plaintiff's complaint without regard for technicalities.

Syllabus 16. Congress, by enacting this Section intended to abrogate absolute privilege conferred by common law upon judicial officers in performance of their duties to the extent indicated by this section. R.S. Sec. 1979.

Page 249; This section gives a right of action sounding in tort to every individual whose Federal rights are trespassed upon by any officer acting under pretense of State law.

Page 250; Sec. 1. of the third civil rights act explicitly applied to "any person". R.S. Sec 1979 applies to "every person". We can imagine no broader definition. *The statute must be deemed to include members of the State judiciary acting in official capacity.* The result is of fateful portent to the judiciary of the several states. But the policy involved is for Congress and not for the Courts.

Page 249; It follows that if the plaintiffs in the case at bar were deprived of a Federal right by state officials or officers acting "under color of any law" or as may be stated more aptly in the instant case "under color of any statute of any state", *these officials must respond in damages to the plaintiffs prescribed by R.S. Sec. 1979.*

On a direct appeal from the District Court this Court held in the case of Polk v. Glover, 305 U. S. 5; 83 L.Ed. 6; on page 11, We are of the opinion that the District Court erred in dismissing the bill of complaint. *Plaintiffs did not submit the case to be decided upon the merits upon the bill, answer and affidavits.* Defendants motion to dismiss, like the demurrer for which it is a substitute (equity rule 29) was addressed to the sufficiency of the allegations of the bill. *For the purpose of that motion, the facts set forth in the bill stood admitted. For the purpose of that motion the Court was confined to the bill and was not at liberty to consider the affidavits or other evidence produced upon the application for an interlocutory injunction.*

The salutory principle that the essential facts should be determined before passing upon grave constitutional questions is applicable, (See Borden Farms Products Co. v. Baldwin, 293 U.S. 194; 79 L.Ed. 281 and cases cited) *and that determination requires a hearing in due course upon the issues raised by the pleadings*

The principle expressed by this Court in the case last cited should apply to the case at bar.

The complaint avers that the State Court did not have any jurisdiction of the subject matter in the said case. (R.4)

It should be noted that the action filed in the State Court (R.6 to 13) was a suit to impress a trust upon a decedent's estate, and the Supreme Court of Colorado had determined that such a case could not be maintained in the District Court, in the case of Oles v. Wilson, 57 Colo. 246; 141 Pac. 489, the Court said " Moreover, the cause of action here set forth must be prosecuted, *if at all* in a Court of Original and general equitable jurisdiction and powers. Its purpose is to impress a trust upon the real and personal property of

the decedent after his debts are paid, and the costs of administration discharged".

So it is doubtful that such a suit could be maintained in the County Court, which is the Court of original jurisdiction as conferred by the Colorado Constitution, Art. 6, Sec. 23.

An inspection of that complaint shows affirmately on its face that the decedent's property was in the actual possession of the County Court, State of Colorado, and had been for more than two years prior to the filing the action in the State Court, and all of the Appellees knew or should have known that such possession could not be disturbed by any other Court, and in such cases this Court held in Byers v. McAuley, 149 U.S. 608; 37 L.Ed. 867, on page 871, Where property is in the actual possession of one Court of Competent jurisdiction, such possession cannot be disturbed by process out of another Court. The doctrine has been affirmed again and again by this Court. (Citing several cases)

Same case on page 875; There is force and logical consistency in the position that the settlement of a decedent's estate is not a suit at law, or in equity, but that such an estate constitutes a res, *as to which the jurisdiction of the probate Court, when it once attaches, is exclusive.*

In Williams v. Hankins, 225 Pac. 243, the Colorado Supreme Court held in a similar matter; The District Court was without jurisdiction in said action No. 7463 to hear and determine anything with reference to the Will, and further, the said judgment was void because the District Court had no jurisdiction of the subject matter of the suit, or to enter the judgment rendered. They further held in the same case; Jurisdiction includes not only the power to hear and

determine the cause but to enter and enforce a judgment. If there is no right in the Court to enter the particular judgment entered, *the entry is without jurisdiction.*

In Bailey v. City of Raleigh, 41 S. E. 281; It was held by the Court, *No man shall be disseised of his property except by the law of the land, that is, by the judgment of a Court of competent jurisdiction.* These propositions are too elementary to require citation of authority.

In Re-McKinnon v. Hall, 10 Colo. App. 291, 50 Pac. 1052, the Court said "The Statutes prescribes the manner in which the administration shall be conducted and the settlement affected. *It provides that all questions of law and fact relating to probate matters shall be determined by the County Court,* and that, from the decisions of that Court in such matters, appeals or writs of certiorari shall lie to the District Court. *There is no other way in which the District Court can acquire jurisdiction of any matter pertaining to the administration of an estate,* except where the County Judge is himself interested as heir, legatee or otherwise, G.S. 501-509. *It was the duty of the Court upon an inspection of the complaint without motion, to refuse to entertain it.*"

The high Court of the State of Colorado having determined the extent of jurisdiction of its own Court in such matters, the proceeding in the State Court was without jurisdiction, and a complete nullity, and in such cases it was held by the Court in Manning v. Ketcham, 58 Fed. (2d) 948, When the judge acts in the clear absence of all jurisdiction, that is, of authority to act officially over the subject matter in hand, the proceeding is coram non judice. *In such a case the judge has lost his official function, has become a mere private person, and is liable as a trespasser for the damages resulting from his unauthorized acts.* Such

has been the law from the days of the case of the Marshalsea, 10 Coke 68. It was recognized as such in Bradley v. Fisher, 13 Wall (80 U.S.) 335-351; 20 L.Ed. 646.

The complaint alleges that the plaintiff demanded a jury trial within the time allowed by law, paid the jury fee as required to do, and that it was denied by the Court (R.3) and the record shows proof of such denial on page 19.

Rule 38 (A), R.C.P. Colo. reads, *Where jury right exists.* Upon demand, in actions for the recovery of specific real or personal property, with or without damages, or for money claimed as due on contract, or as damages for breach of contract, or for injuries to person or property, *an issue of fact must be tried by a jury,* unless a jury trial is thereafter waived.

That is the law in Colorado, it is fair on its face, does not discriminate, applies to everyone in similar circumstances, *and does not give the Court any discretion in the matter.* If that be true, can it be said that the plaintiff was not denied the equal protection of the law in Colorado?

In Howard Sports Daily v. Weller, 18 A. (2d) 210; 179 Md. 355, the Court held, If a law is so applied and administered as to make unjust discrimination between persons in similar circumstances material to their rights, *such denial of equal justice "violates due process of law" and equal protection of laws clauses of the Federal and State Constitutions.*

I now refer to the opinion of the Court below, (R.44) the Court said, "But Sections 43 and 47 grant separate and distinct rights of action"; I agree but it should be noted that I am proceeding under Sec. 43 only; (R.2) following that statement the Court said "*Section 43 does not give a cause*

of action for denial of equal protection of the laws, nor does Section 47 give a cause of action for denial of due process of law." This Court has held, Section 43 does give a right and a cause of action for denial of such rights secured by the United States Constitution.; In the case of Hague v. C.I.O., 307 U. S. 496; 83 L.Ed. 1423, on page 1442, Justice Stone speaking for the Court says, "*It will be observed that the cause of action, given by the Section in its original as well as its final form, extends broadly to deprivations by state action of the rights, privileges and immunities secured to persons by the Constitution. It thus includes the Fourteenth Amendment and such privileges and immunities as are secured by the due process and equal protection clauses, as well as by the privileges and immunities clause of that amendment.*

It is the contention of the Appellant that His Federal rights, secured by the Constitution were invaded by the State acting through its judiciary department, and all of the Appellees are officers of such department of the State: Now, can it be said that the decree entered by the State Court, (R.16-18) and the denial of a jury trial by order of the Court, (R.19) is not State action? Also can it be said that the decree entered by the State Court without jurisdiction, does not deprive the Appellant of his property without due process of law, and did not the denial of a jury trial deny him the equal protection of the laws? There can be only one answer in the affirmative, and these officials should respond in damages as prescribed by the Statute, for such deprivations of Federal rights. It is a well known rule of law that jurisdiction of a Court *must be conferred by law,* and not mere consent.

Since the motion to dismiss merely attacks the sufficiency of the complaint, and is not a defense to the action,

it was error for the Court to dismiss the action, the remedy in such matters is a motion to make the complaint more definite and specific, or a motion for a bill of particulars, and the granting of the motion defeats the purpose for which the new Federal rules of civil procedure was promulgated, that is, that *all pleadings shall be so construed as to do substantial justice*, and that the rules shall be liberally construed to secure the just, speedy and inexpensive determination of every action.

The record shows that the Courts below have determined the controversy upon the merits, without a hearing in due course; I did not submit my case to be decided upon the merits of the complaint, as a matter of fact, *I demanded a jury to decide the facts*, (R.6) pursuant to rule 38 (A) Fed. Rules Civil Procedure, and the seventh amendment to the United States Constitution. In the case of Garhart v. United States, 157 Fed. (2d) 777, It was held by the Court, A conspiracy is established if the circumstances, acts and conduct of the parties are of such character that the minds of reasonable men can conclude therefrom that an unlawful agreement exists.

The last paragraph of the opinion of the Court below states, (R.46) "It is shown upon the face of this complaint that the Appellant regularly invoked the jurisdiction of the State Court, the case was tried, and judgment was rendered".: That is not a correct statement of the facts, the complaint avers, that the State Court lacked jurisdiction of the subject matter, and legal representative of the deceased: The case was tried without a jury, a jury having been demanded and denied by the Court: that judgment was intentionally and deliberately entered. The allegations of the complaint being true, the proceeding in the State Court was a complete nullity, and thereby deprived the

Appellant of his property without due process of law, and denied him the equal protection of the laws of the State. The opinion further states on the same page, "Without more it is clear that the Appellant was not denied due process of law or the equal protection of the laws": Since it is the province of a jury to determine the facts alleged, it is suffice to say that the rule laid down by this Court, in Polk v. Glover, Supra, is controlling and binding on the Courts below, and the Appellant is entitled to an opportunity to try to prove his claim (See Carrol v. Morrison, Supra).

CONCLUSION

The decision of the Court below conflicts with the decision of the third Circuit Court in the Case of Picking v. Penna. R. Co. 151 Fed (2d) 240; in this way, The third circuit did not affirm the lower court, nor did it determine whether or not the plaintiffs were deprived of their freedom without due process of law; The Court below affirmed the trial court and determined the Appellant was not deprived of his property without due process of law, nor denied the equal protection of the laws, and it also conflicts with the decision of this court in the case of Polk v. Glover, 305 U.S. 5; 83 L.Ed. 6 page 11, because this Court definitely settled the question that Constitutional questions cannot be determined without a hearing in due course, upon the issues.

The decision of the Court below in construing the Federal Statute in question, conflicts with the decision of this Court in the case of Hague v. C.I.O. 307, U.S. 496; 83 L.Ed. 1423 on page 1442, in this way, The Court below construed that the statute in question does not give a cause of action for

such deprivations of rights secured by the Constitution, this Court held it does in the case of Hague v. C.I.O. Supra.

Since the decisions of this Court are binding upon the lower Courts, it was error for the Court to grant the motion to dismiss, and the judgment should be reversed.

Respectfully submitted,

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